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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE JUNIPER NETWORKS, INC. SECURITIES LITIGATION	No. C06-04327-JW (PVT)
THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, et al., Plaintiffs, v. LISA C. BERRY, Defendant.	**UNOPPOSED APPLICATION OF LEAD PLAINTIFF IN SUPPORT OF PRELIMINARY APPROVAL OF PROPOSED PARTIAL CLASS SETTLEMENT, PLAN OF ALLOCATION, FORM OF SETTLEMENT NOTICE, AND PROPOSED AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES** No. C08-0246-JW (PVT) Date: March 29, 2010 Time: 9:00 a.m. Place: Courtroom 8, 4th Floor Judge: James J. Ware

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APPLICATION

Lead Plaintiff, the New York City Employees' Retirement System, the Teachers' Retirement System of the City of New York, the New York City Fire Department Pension Fund, the New York City Police Pension Fund, the New York City Police Superior Officers' Variable Supplements Fund, the New York City Police Officers' Variable Supplements Fund, the New York City Firefighters' Variable Supplements Fund, the New York City Fire Officers' Variable Supplements Fund and the New York City Teachers' Retirement System of the City of New York Variable Annuity Program (collectively, the "NYC Funds" or "Lead Plaintiff") hereby applies to this Court for an order preliminarily approving (1) the terms of the proposed partial settlement ("Settlement") set forth in the Stipulation of Settlement dated March 15, 2010 ("Stipulation"); (2) the form and manner for providing notice to the Class; (3) the proposed Plan of Allocation; and (4) the proposed award of attorneys' fees and expenses. Lead Plaintiff further requests that the Court schedule a hearing to determine whether the Settlement, the Plan of Allocation, and the application for attorneys' fees and expenses, which are described in the accompanying Class Notice, should be given final approval.

The Settlement provides for the payment of $169,000,000 plus interest earned thereon for the benefit of the certified class of investors in Juniper publicly traded securities.[1] If approved, the Settlement would resolve all claims in *In re Juniper Networks, Inc. Sec. Litig.*, C06-04327-JW (N.D. Cal.) (the "Juniper Action"), against Juniper Networks, Inc. ("Juniper" or the "Company"), and individual defendants Scott Kriens, Marcel Gani, Pradeep Sindhu, Robert M. Calderoni, Kenneth Goldman, William R. Hearst III, Stratton Sclavos, Vinod Khosla, Kenneth Levy, William R. Stensrud (collectively with Juniper, the "Juniper Defendants") and claims in the related class action, *The New York City Employees' Retirement System v. Berry*, C08-0246-JW (N.D. Cal.) (the "Berry Action"), against Lisa C. Berry ("Berry"). Berry and the Juniper

[1] Pursuant to the terms of the Memorandum of Understanding dated February 5, 2010 (the "MOU"), the Settlement Fund was deposited by Defendants into an escrow account established by Lead Plaintiff's counsel with Amalgamated Bank, the escrow agent approved by the parties.

Defendants are referred to collectively as the "Defendants."

The grounds for this application are that the Settlement, Plan of Allocation, and requested fee award are within the range of fairness. Lead Plaintiff further contends and requests that notice should be sent to members of the Class in the form submitted herewith, which proposed notice adequately apprises the Class about the terms of the Settlement and Class members' rights with respect to the proposed Settlement.

This application is based on the Memorandum of Points and Authorities set forth below; the Stipulation and exhibits; the proposed Plan of Allocation; the Declarations of Barbara Hart ("Hart Decl."), Michael A. Marek ("Marek Decl.") and Charles Ferrara ("Ferrara Decl."); and all other pleadings and matters of record.

Defendants support this application for preliminary approval of the Settlement. A proposed form of order is attached as Exhibit A to the Stipulation, which has been filed concurrently.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the proposed settlement of this action should be preliminarily approved by this Court as within the range of fairness, reasonableness and adequacy.

2. Whether the proposed settlement notice adequately apprises the members of the Class about the terms of the settlement and their rights with respect to it.

3. Whether the proposed plan of allocation should be preliminarily approved.

4. Whether a hearing date should be scheduled for final approval of the settlement, the plan of allocation, and the application for attorneys' fees and reimbursement of expenses.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Lead Plaintiff seeks preliminary approval of the $169,000,000 all-cash Settlement with Juniper Networks Inc. and certain of its current and former officers and directors on the grounds that it is fair, reasonable and adequate, and requests that notice be sent to the certified Class.

The proposed Settlement is an excellent result, achieved after extensive discovery was

taken from the Juniper Defendants, and notwithstanding difficult litigation risks. As set forth below, the Settlement, Plan of Allocation, and request for fees and expenses are within the range of reasonableness so that notice should be sent to the proposed Class; and the settlement notice adequately apprises Class members of the terms of the Settlement and their rights with respect to it.

II. THE LITIGATION

Beginning on July 14, 2006, class action complaints were filed against Juniper and the Individual Defendants. On November 20, 2006, the actions were consolidated, the NYC Funds were appointed as the Lead Plaintiff, and the Court approved Lead Plaintiff's choice of the law firm of Lowey Dannenberg Cohen & Hart, P.C. ("LDCH") as Lead Counsel. On January 12, 2007, Lead Plaintiff filed a Consolidated Class Action Complaint. In March 2007, Juniper filed restated financial statements, reducing the Company's earnings by $900 million over a several year period to properly account for compensation expenses associated with historical stock option grants. On April 9, 2007, Lead Plaintiff filed the Amended Consolidated Class Action Complaint (the "Complaint").

The Complaint alleges that Defendants engaged in a long-running scheme whereby Defendants failed to disclose that they had manipulated stock option grant dates in order to provide Juniper officers, directors and employees with more favorable option exercise prices with the benefit of hindsight. Like many companies, Juniper used stock options as a form of compensation for its directors, officers and employees, and Juniper's representations about its stock option grants stated that such grants were made at the market price on the date of the option grant. Lead Plaintiff alleges, however, that Defendants failed to disclose that Juniper backdated the grant dates, *i.e.*, it retroactively selected dates in the past, when the market price was lower, as the "grant date" so that the options were "in the money" when issued.

The Complaint alleges that from the time Juniper went public in June 1999, the Company's financial statements and proxy statements were materially false and misleading in representing (1) that under the Company's stock option plans, no stock options "have been

granted for less than fair market value on the date of grant"; (2) that no compensation expense was recognized for the option grants because "the exercise price of the Company's stock options equals the market price of the underlying stock on the date of grant"; and (3) that stock options "will provide value to executive officers only when the price of the Company's common stock increases over the exercise price." Lead Plaintiff alleges that by secretly backdating the grant dates to a date when the market price was lower, Defendants contradicted Juniper's public representations, and routinely issued in-the-money options without recording compensation charges, as required by generally accepted accounting principles ("GAAP").

The Complaint further alleges that when Juniper's stock options practices were disclosed by the financial media in May 2006, Juniper's stock price declined by 11 percent on May 18 and May 19, 2006, and dropped another 9 percent on August 10 and August 11, 2006 in connection with the Company's announcement that it intended to restate its financial results, from January 2003 through March 31, 2006. Following the disclosure of the backdating scheme, Juniper undertook an internal investigation and ultimately disclosed the results of the investigation in its 2006 Form 10-K, dated March 9, 2007. The Complaint alleges that these disclosures admit that:

- Juniper backdated options granted to executives, directors and personnel to ensure that the options were "in the money" when granted.
- One or more Juniper senior executives orchestrated this deliberate backdating.
- The backdating involved the falsification of documents, including documents filed with the Securities and Exchange Commission ("SEC"), which misrepresented executive and director compensation, the Company's option granting practices, and its financial results.
- Juniper violated GAAP and thereby materially understated expenses and overstated net income, necessitating a restatement of $900 million.

In the Complaint, Lead Plaintiff alleges claims against Juniper and certain of its current and former senior officers under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and Rule 10b-5 issued by the SEC, and Sections 11 and 15 of the Securities Act of 1933 and directors.[2] On June 7, 2007, Juniper filed a motion to dismiss the amended class complaint.

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[2] The officer defendants include Scott Kriens ("Kriens") (Chairman and Chief Executive Officer from 1996 to July 2008) and Marcel Gani (Chief Financial Officer from 1997 to 2004,

In their motion, the Juniper Defendants primarily challenged (1) whether Lead Plaintiff was able to plead facts supporting a strong inference of scienter, *see Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308 (2007), and (2) whether Lead Plaintiff had adequately alleged loss causation with respect to Juniper's stock price declines in May and August 2006. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005). Juniper also challenged Lead Plaintiff's standing to assert a Section 11 claim based on the November 2003 notes offering, and whether Lead Plaintiff had adequately pled control person liability under Sections 20(a) and 15 against the Company's outside directors.

On March 31, 2008, this Court granted in part and denied in part the Juniper Defendants' motion to dismiss, finding each element of securities fraud: scienter, loss causation, and damages, was adequately pled. The Court also held that Lead Plaintiff had standing to assert claims on behalf of purchasers of the Notes and had adequately alleged control person liability against the outside Directors. *In re Juniper Networks, Inc. Sec. Litig.*, 542 F. Supp. 2d 1037 (N.D. Cal. 2008).

On January 14, 2008, Lead Plaintiff filed a related action in this Court against Lisa C. Berry, Juniper's former General Counsel, Vice-President and Secretary. *New York City Employees' Retirement System. v. Lisa C. Berry*, Case No. 08-0246-JW (the "Berry Action" and together with the Juniper Action, the "Actions"). Lead Plaintiff asserts Section 10(b) and 20(a) claims against Ms. Berry.

On September 29, 2008, Ms. Berry moved to dismiss, arguing, among other things, that the complaint failed to plead primary liability under Rule 10(b) under the Supreme Court's recent decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148

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and Chief of Staff from 2005 to 2006). The director defendants include Kriens, William R. Hearst III, Vinod Khosla, Kenneth Levy, Stratton Sclavos, Pradeep Sindhu, William R. Stensrud, Robert Calderoni, and Kenneth Goldman. Each director defendant was sued as a "control person" of Juniper and as a signatory to one or more registration statements for the NetScreen Merger and/or the Notes. Ernst & Young LLP, which is not a party to the Settlement, is also named as a defendant on the claim relating to the NetScreen Merger. Lead Plaintiff continues to prosecute its claim against Ernst & Young.

(2008), and that the complaint failed to adequately allege Berry's scienter. On May 15, 2009, the Court granted in part and denied in part Ms. Berry's motion to dismiss the initial complaint against her. 616 F. Supp. 2d 987 (N.D. Cal.).

On June 18, 2009, Lead Plaintiff filed an amended class action complaint against Ms. Berry. On July 13, 2009, Ms. Berry moved to dismiss the amended complaint and strike certain allegations in the amended complaint derived from evidence obtained during discovery in the Juniper Action and from allegations included in the SEC complaint against Berry, which is pending before Judge Whyte. On September 24, 2009, this Court granted in part and denied in part Ms. Berry's motion to dismiss the Amended Complaint. *New York City Employees' Retirement System v.* Berry, 667 F. Supp. 2d 1121 (N.D. Cal. 2009). The Court held, *inter alia*, that Lead Plaintiff had adequately alleged that Berry "played a significant role in drafting and editing" Juniper's false financial statements issued during the Class Period, even though she was not a signatory to the SEC filings. *Id.* at 1124.

On March 2, 2009, Lead Plaintiff moved to certify the class in the Juniper Action; Juniper filed its opposition to class certification on June 2, 2009. In connection with Lead Plaintiff's motion, the Parties engaged in substantial fact and expert discovery, briefing and oral argument.

On September 25, 2009, the Court granted Lead Plaintiff's motion for class certification on behalf of Juniper investors during the period July 11, 2003 through August 10, 2006. In re Juniper Networks, Inc. Sec. Litig., No. C06-04327, 2009 WL 3353321 (N.D. Cal. Oct. 16, 2009) (amended opinion). In so ruling, the Court held that Lead Plaintiff's evidence was sufficient to support its theory of loss causation relating to the May 2006 disclosures. Id. at *7.

On September 28, 2009, Juniper filed a motion for leave to file a motion for reconsideration in order to, among other things, redefine the Class definition. On October 16, 2009, the Court denied Juniper's motion and certified the following Class:

> All persons and entities who purchased or otherwise acquired the publicly traded securities of Juniper Networks, Inc. from July 11, 2003 through August 10, 2006, inclusive and who did not sell such acquired securities before May 18, 2006, were damaged, including (a) those who received or acquired

> Juniper common stock issued pursuant to a registration statement on SEC Form S-4, dated March 10, 2004, for the Company's merger with NetScreen Technologies Inc.; and (b) purchasers of Zero Coupon Convertible Senior Notes due June 15, 2008 issued pursuant to a registration statement on SEC Form S-3, dated November 20, 2003. Excluded from the Class are the Defendants and the current and former officers and directors of the Company, their immediate families, their heirs, successors, or assigns and any entity controlled by any such person.

2009 WL 3353321, at *10.

On October 12, 2009, the parties filed a Submission re: Dissemination of Class Notice, attaching a form of class notice.

The parties conducted extensive discovery pursuant to the Court's Discovery Plan. Prior to engaging in a second round of settlement discussions (the details of both settlement negotiations are set forth below), Lead Plaintiff examined more than 2.5 million pages of documents produced by the Defendants and third parties, and deposed 28 witnesses. Defendants have conducted depositions of representatives of Lead Plaintiff and numerous third-party witnesses.

In September 2009, the Juniper Defendants filed a motion for judgment on the pleadings seeking a ruling that the May 2006 disclosures did not constitute corrective disclosures for which Lead Plaintiff can plead loss causation. The motion has been fully briefed; however, the parties agreed to adjourn the hearing on the motion until March 15, 2009. In the interim, Lead Plaintiff and the Defendants engaged in a two-day mediation conference on February 4-5, 2010.[3]

III. THE SETTLEMENT NEGOTIATIONS

Lead Plaintiff has participated in all major litigation decisions and has overseen the negotiations conducted by Lead Counsel that resulted in the proposed Settlement. The negotiations were at all times conducted at arm's length. In anticipation of a potential mediation, in September 2008 Lead Plaintiff negotiated the voluntary production of all documents produced to the SEC despite the PSLRA stay of discovery. Based on that database, the parties exchanged

[3] Similarly, the parties postponed certain depositions until after the February mediation due to (1) the pending mediation; (2) resolution of outstanding motions to compel; and (3) the Juniper Defendants' motion for reconsideration regarding Judge Trumbull's December 9, 2009 ruling that the Audit Committee's investigation is not entitled to work-product protection.

damages reports and mediation statements. The parties engaged in an initial mediation before the Honorable Nicholas Politan. The initial mediation was unsuccessful with the parties extremely far apart after the first day. Hart Decl. ¶¶ 17-19. The parties then engaged in 17 months of intensive discovery, during which period several legal rulings were issued by the Court which have shaped the contours of the litigation.

The parties began a second round of negotiations in November 2009. Even prior to the exchange of settlement offers, the parties addressed several other key issues concerning the selection of the mediator, the parameters of the mediation and negotiated the range within which the mediation would proceed. *Id.* ¶ 22. In late January and early February 2010, Lead Plaintiff and the Juniper Defendants again exchanged extensive analyses regarding liability and damages as part of the mediation process. Defendants raised several independent bases for reducing any potential liability, including its respective extent of liability and Lead Plaintiff's burden to conclusively establish loss causation with respect to each of the corrective disclosure dates. *Id.* These submissions gave additional clarity to the strengths and weaknesses of Lead Plaintiff's claims and the defenses thereto.

The mediation sessions began on February 4, 2010 under the aegis of a professional mediator, retired United States District Court Judge Abraham Sofaer. As described in the accompanying Hart Decl., the negotiations among Lead Plaintiff, through Lead Counsel, and counsel for Defendants, were arduous and contentious. In the evening of the second full day of negotiations with all principals and counsel present, an agreement in principle was reached to settle the class action claims against Defendants for $169,000,000, the terms of which were contained in a MOU executed by the parties. *Id.* ¶ 23. Subsequent negotiations ensued over the next several weeks, which resulted in the Stipulation of Settlement executed on March 15, 2010. *Id.* ¶ 24.

The Settlement proceeds, after payment of taxes, costs, expenses and attorneys' fees, will be distributed to Class members who timely file proofs of claim. The Plan of Allocation provides that the net proceeds will be distributed *pro rata* to members of the Class, based on a

formula which takes into account their investment losses. The proposed Plan of Allocation is attached as Ex. A to the Marek Declaration and is described in detail in the proposed Class Notice (Ex. A-1 to Stipulation).

Lead Plaintiff and Lead Counsel submit that the $169,000,000 settlement is an excellent result that should be preliminarily approved, given the immediate financial benefit and the significant litigation risks involved in this case if the two class actions against Defendants are not resolved. Likewise, the Plan of Allocation and application for attorneys' fees and expenses should be preliminarily approved as fair and reasonable, and notice should be provided to the Class.

IV. ARGUMENT

A. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

1. Preliminary Approval Standards

Rule 23(e) of the Federal Rules of Civil Procedure requires Court approval for a class action settlement. The Ninth Circuit maintains a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Approval of a proposed class action settlement is within the broad authority of the district court consistent with this long-standing policy favoring settlements. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998).

The class action settlement approval process involves two steps: first, preliminary approval, followed by notice to the class, and then final approval. *See, e.g., West v. Circle K Stores*, Civ. S-0438, 2006 WL 1652598, at *2 (E.D. Cal. June 13, 2006). The test for whether preliminary approval should be granted has both a procedural and a substantive component. The court in *Young v. Polo Retail, LLC*, C-02-4546, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25, 2006), quoting from NEWBERG ON CLASS ACTIONS, §11.25 (1992) explained the procedure as follows:

> If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range

> of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing. . . . MANUAL FOR COMPLEX LITIGATION, Second §30.44 (1985). In addition, '[t]he court may find that the settlement proposal contains some merit, is within the range of reasonableness required for a settlement after, or is presumptively valid.' NEWBERG ON CLASS ACTIONS §§11.25 (1992).

See also Rosenburg v. IBM, C06-00430, 2007 WL 128232, at *5 (N.D. Cal. Jan. 11, 2007) (preliminary approval granted where "Settlement has no obvious defects and is within the ranges of possible Settlement approval such that notice to the Class is appropriate"); *Satchell v. Fed. Express Corp.*, C03-2659, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) (preliminarily approving non-collusive settlement that had no obvious defects and was within the range of fairness).

2. The Settlement Agreement Resulted from Arm's-Length Negotiations

There is an initial presumption of fairness for a proposed settlement that results from arm's-length negotiations. *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008); *In re Wireless Facilities, Inc. Sec. Litig. II*, 07CV482, 2008 WL 4146126, at *3 (S.D. Cal. Sept. 3, 2008). Here, the proposed settlement is the product of arm's-length negotiations over a several-month period between Lead Plaintiff, through its counsel, and the Juniper Defendants, through their counsel. As noted above, in September 2008, the parties engaged in initial negotiations and a mediation which was unsuccessful. Following intensive discovery over a 17 month period, negotiations resumed. Those negotiations culminated in a two-day mediation session on February 4 and 5, 2010 under the auspices of the Hon. Abraham D. Sofaer. "[T]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Satchell*, 2007 WL 1114010, at *4; *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal. 2007). Moreover, the parties' views on the factual and legal issues were well-informed by merits discovery, as well as a series of rulings by this Court giving contours to the claims. *See In re Juniper Networks Sec. Litig.*, 542 F. Supp. 2d 1037 (N.D. Cal. 2008); *NYCERS v. Berry*, 616 F. Supp. 2d 987 (N.D. Cal. 2009); *Berry*, 667 F. Supp. 2d 1121 (N.D. Cal. 2009); *Juniper*, 2009 WL 3353321. As a result, the parties were able to negotiate a

fair settlement, taking into account the costs and risks of continued litigation. Hart Decl. ¶¶ 26-29. These negotiations produced a result that all parties believe to be within their respective best interests.

The opinion of well-informed and experienced counsel in favor of the settlement is also entitled to significant weight. *See, e.g., In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007); *In re First Capital Hldgs. Corp. Fin. Prods. Sec. Litig.*, MDL 901, 1992 WL 226321, at *2 (C.D. Cal. June 10, 1992) (counsel's opinion favoring settlement is a compelling factor); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979). Lead Plaintiff and Lead Counsel consider their claims meritorious, but not without risk. They have concluded that it is in the best interests of the Class to settle with the Defendants after considering the following factors: (1) the immediate benefits provided for the Class; (2) the risks and uncertainties in predicting the outcome of complex litigation; (3) the expense and length of time necessary to prosecute two separate Class Actions through trial and appeals; and (4) the challenges asserted by and available to the Defendants that could substantially reduce the claimed damages.

In this regard, Lead Plaintiff's theory of damages is based upon establishing that Juniper's stock prices declined in response to adverse revelations about the Company's stock option practices on four disclosure dates: May 18, May 19, August 10 and August 11, 2006. Lead Plaintiff's financial expert estimates total damages resulting from losses in Juniper's stock value on these four dates at approximately $957 million. *See* Marek Decl. ¶ 13. However, Defendants vigorously challenge Lead Plaintiff's ability to establish the causal connection for three out of four disclosure dates, which account for 80% of the claimed recoverable damages.

In September 2009, the Juniper Defendants filed a motion for judgment on the pleadings seeking a ruling that the May 2006 disclosures were not corrective disclosures for which Lead Plaintiff can plead loss causation, based upon this Court's decision in *In re Maxim Integrated Prods. Sec Litig.*, No. C08-00832JW, 2009 WL 2136939 (N.D. Cal. July 16, 2009). If Defendants' motion is successful, it would eliminate over 60 percent of the claimed damages.

Defendants' motion has been fully briefed; however, the parties adjourned the hearing on the motion in light of the mediation.[4]

The Juniper Defendants also challenge causation resulting from the decline in Juniper's share price on August 10, 2006. Lead Plaintiff contends that news of Juniper's restatement was "leaked" to the market prior to Juniper's public release of the restatement announcement after the market closed on August 10, 2006. Although discovery revealed dozens of individuals that were aware of the impending restatement announcement prior to its public release, Defendants have argued Lead Plaintiff's leakage theory falls short as merely circumstantial. If Defendants' position prevails on summary judgment, or Lead Plaintiff fails to convince a jury of leakage, it would reduce recoverable damages by almost another 20 percent. *See* Hart Decl. ¶ 29. Accordingly, in light of these uncertainties, the Settlement amount is more than satisfactory. *See In re Cisco Systems, Inc. Sec. Litig.*, 01-20418-JW, slip op. (Dec. 5, 2006) (Dkt. 633) (approving $99 million settlement where there were substantial risks in proving damages).

3. The Settlement Has No Obvious Deficiencies and Falls Within the Range for Approval

"[A]t this preliminary approval stage, the court need only 'determine whether the proposed settlement is within the range of possible approval.'" *West*, 2006 WL 1652598, at *11 (citation omitted); J. Moore, *et al.,* MOORE'S FED. PRAC., ¶23.8102-1, at 23-479 (2d ed. 1993). Under this Settlement, Defendants will pay $169,000,000, which is the third largest settlement in gross dollars for all cases involving the backdating of stock options.

It is difficult to compare the Settlement to the theoretical amount that the Class might have obtained had it been completely successful in establishing liability at trial, because the parties fiercely debated issues of causation and damages. During the course of negotiations, the parties discussed at length Defendants' loss causation challenges with respect to the alleged correction disclosures in May and August 2006. The $169 million proposed Settlement represents a generous percentage of recovery – ranging from 18% to 94% of damages –

[4] On February 16, 2009, the motion was withdrawn in light of the proposed settlement.

depending on whether one or more of the four disclosure dates are excluded from the damages calculus. In all events, the percentage of recovery is well above the median percentage of investor losses recovered recovery level in securities class action settlements. *See OmniVision*, 559 F. Supp. 2d at 1042 (approving 6% recovery of maximum damages) (citing *In re Heritage Bond Litig.*, 02ML1475, 2005 WL 1594403, at *8-9 (C.D. Cal. June 10, 2005) (average recovery between 2% to 3% of maximum damages)). The percentage of recovery also falls within the higher end range of recoveries in terms of dollar value and percentage of recovery for comparable options backdating settlements. *Cf. Ofcrs. for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982) ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair"). *See also Knight v. Red Door Salons, Inc.* 08-01520, 2009 WL 248367, at *3 (N.D. Cal. Feb. 2, 2009) ("The immediacy and certainty of the settlement award justifies a recovery smaller than the Class Members could seek in the case").

4. The Risk, Expense and Complexity of the Action

The fairness of the Settlement is further underscored when the obstacles the Class faced in succeeding on the merits, as well as the expense and likely duration of the litigation, are considered. *See Churchill Village, L.L.C. v. GE*, 361 F.3d 566, 576 (9th Cir. 2004). Although Lead Plaintiff believes that Defendants' arguments described above lack merit, a substantial risk existed that Defendants would prevail on one or more of these arguments on their motion for judgment on the pleadings, at summary judgment, or ultimately at trial.[5] Defendants have denied, and continue to deny, each and all of the claims asserted by Lead Plaintiff.

The settlement will confer an immediate benefit to the Class and eliminate the risk of

[5] As discussed in further detail herein, even if Lead Plaintiff were to prevail at trial, risks to the Class would remain. For example, Defendants certainly would initiate a lengthy and costly appeal process to challenge the verdict. Moreover, any verdict returned by a jury would be subject to the presiding judge's evaluation and, as such, could be overturned. *See, e.g., In re Apple Computer Sec. Litig.*, 84-20148-JW, 1991 WL 238298 (N.D. Cal. Sept 6, 1991) (this Court entered a judgment notwithstanding the verdict for the individual defendants and ordered a new trial against the corporate defendant); *In re Apollo Group, Inc. Sec. Litig.*, CV 04-2147-PHX, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008) (overturning a trial verdict because there was insufficient evidence at trial to prove loss causation).

continued litigation under circumstances where a favorable outcome is far from certain. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (affirming approval of settlement because "[c]omplex litigation is inherently uncertain and Plaintiffs would have had much difficulty proving scienter"); *see also Knight,* 2009 WL 248367, at *3 (acknowledging that the settlement agreement that offered an immediate and certain award for the Class was a superior alternative to continued litigation in light of the uncertain risks associated with plaintiffs' claims). Given that Defendants aggressively challenged liability, causation, and damages, and would continue to do so through summary judgment, trial and appeals, the $169,000,000 settlement manifestly falls within the range of possible approval and possesses no obvious deficiencies.

5. The Proceedings Are Sufficiently Advanced To Permit Preliminary Approval of the Settlement

Lead Plaintiff, through Lead Counsel, is thoroughly familiar with the factual and legal issues in this case. Hart Decl. ¶¶ 7-8. Lead Plaintiff's claims have been tested and have survived motions to dismiss in both Actions as well as challenges at the class certification stage. Fact discovery in the Juniper Action is substantially complete. Lead Counsel has examined more than 2.5 million pages of documents have been produced by the Defendants and third parties, and has deposed 28 witnesses. In addition, Lead Plaintiff and the Juniper Defendants also presented comprehensive evidentiary submissions in late January and early February 2010 pursuant to the mediation process. The parties' respective positions on liability and damages were explored most recently in great detail before the mediator, former federal Judge Abraham Sofaer. As a result, Lead Counsel is thoroughly familiar with the facts of the case and has had ample opportunity to assess the strengths and weaknesses of the claims in which to appraise the sufficiency of the settlement. *See CLRB Hanson Indus. LLC v. Google Inc.*, 05-03649-JW, slip op. (N.D. Cal. May 12, 2009) (granting motion for settlement at a parallel stage of the proceedings); *see also Knight*, 2009 WL 248367, at *4.

B. THE PROPOSED PLAN OF ALLOCATION SHOULD BE PRELIMINARILY APPROVED

The proposed Plan of Allocation will govern how the settlement proceeds will be distributed among Class members who timely file proofs of claim. The Plan of Allocation is attached as Exhibit A to the accompanying Declaration of Michael A. Marek and detailed in the Class Notice, Ex. A-1 to Stipulation at 16-19, so that members of the Class can determine how their share of the Settlement and those of other claimants will be calculated.

A plan of allocation will be preliminarily approved so long as "the proposed plan is rationally related to the relative strengths and weaknesses of the respective claims asserted." *Rosenburg*, 2007 WL 128232, at *5. *See also In re Oracle Sec. Litig.*, C-90-0931, 1994 WL 502054, at *1 (N.D. Cal. Jun. 18, 1994) (reasonable to allocate more to class members with stronger claims).

Here, the proposed Plan of Allocation was prepared by Lead Counsel in consultation with its expert, Michael Marek, who found it to be fair and equitable. Marek Decl. ¶ 10. Under the Plan of Allocation, all purchasers of Juniper common stock during the Class Period are treated equally. They will receive their pro rata share of the total claims submitted. Recognized Losses are based upon a constant inflation amount of $3.02 per share for stock, and $25 per Note, for all Class Period purchases before May 18, 2006, the date of the first corrective disclosure. *Id.* ¶ 11. The Plan of Allocation also limits losses depending upon the date of sale. Consistent with this Court's class certification order, purchasers who sold Juniper securities prior to May 18, 2006 are excluded from the definition of the Class because his or her losses were unrelated to the partial corrective disclosures about Juniper's option practices made on May 18, 2006. The POA also takes into account sales during the 90-day period following Juniper's August 10, 2006 announcement that the Company intended to restate its financial results. *Id.* ¶ 12. Under PSLRA Rule 10b-5, damages will be reduced for Class members who sold during this period to the extent that the average stock price between August 11 and the date of sale was higher than the

market price on August 11, 2006.[6] *See* POA, note 2.

Accordingly, the proposed Plan of Allocation should be preliminarily approved.

C. THE PROPOSED NOTICE PLAN MEETS ALL REQUIREMENTS

"For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The proposed notice program, provided under the Stipulation, complies with the requirements of Rule 23, and the PSLRA.[7]

Lead Plaintiff proposes to give interested parties notice via two separate approaches: (1) by first-class mail, addressed to all Class Members who can reasonably be identified and located; and (2) by publication. After a competitive bidding process from respected and established notice and administration consultants, Lead Plaintiff has retained Rust Consulting, Inc. ("Rust"), an experienced claims administrator, to handle the notice and claims process. Declaration of Charles E. Ferrara, ¶¶ 1-2. As provided in the Preliminary Hearing Order (Ex. A to Stipulation), Rust will mail the Class Notice to all Class members whose names and addresses appear in Juniper's transfer records and to other Class members whose names and addresses are provided by nominees. *Id.* ¶¶ 6-9. In addition, Rust will issue a press release announcing the Settlement and post the Notice on its website. *Id.* ¶¶ 10-11. A Summary Notice will also be published once in the national edition of *The Wall Street Journal* and in *The San Jose Sun Mercury News*. *Id.* ¶ 12.

The Class Notice advises putative Class members of the existence of the class action, and their rights with respect to the proposed Settlement. Class Notice, Ex. A-1 to Stipulation at [1-

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[6] The PSLRA's 90-day lookback provision is not applicable to Lead Plaintiff's Section 11 claims with respect to the NetScreen merger and the Notes.

[7] For purposes of settlement only, the parties request that the Court consolidate the Juniper Action with the Berry Action under Rule 42, Fed. R. Civ. P., and certify the Berry Action as a class action with the same Class definition as previously certified in the Juniper Action. *See* [Proposed] Order Preliminarily Approving Settlement and Providing For Notice (attached as Ex. A to the Stipulation), ¶¶ 1-4.

2]. Specifically, the Notice describes (1) the basis for the Settlement and potential recovery on an average per share basis;[8] (2) a brief description of the maximum amount of fees and expenses that Lead Counsel will seek (less than 6% of the Net Settlement Fund after payment of reasonable expenses) and such amount on a per share basis; (3) the Plan of Allocation, which apprises Class members how their "Recognized Loss" will be calculated; (4) information about how to participate in the Settlement; (5) the Court's procedures for final approval of the Settlement; (6) procedures for a Class member to opt out or to object to any aspect of the proposed Settlement, Plan of Allocation, or requested fee award; and (7) instructions as to how to obtain additional information regarding the Action and the Settlement. *See* 15 U.S.C. § 78u-4(a)(7). Similar forms of notice routinely have been approved. *E.g., In re Wireless Facilities, Inc. Securities Litigation II*, 2008 WL 4146126 (S.D. Cal. 2008).

Moreover, the Proof of Claim (Ex. A-2 to the Stipulation) apprises Class Members that failure to complete and submit a Claim Form, in the manner and time specified, constitutes a waiver of any right to share in the Settlement Fund. Accordingly, the manner of notice satisfies due process and Rule 23. *See Rosenburg,* 2007 WL 128232, at *5-6; *Wireless Facilities,* 2008 WL 4146126, at *8.

D. PROPOSED SCHEDULE FOR FINAL APPROVAL PROCEEDINGS

Based on the terms of the Stipulation and Preliminary Approval Order (Ex. A thereto), Lead Plaintiff proposes the following schedule for the Court's review:

Event	Time for Compliance
Date by which the Claims Administrator shall mail by first-class mail the Notice and the Proof of Claim to be to all Class members who can reasonably be identified ("Notice Date")	22 days after the Court's entry of the Preliminary Approval Order[9]

[8] Depending on the number of eligible shares purchased by investors who elect to participate in the settlement and when those shares were purchased and sold, the average distribution, if all class members file valid claims, is estimated to be $0.383 per damaged share. *See* Marek Decl. ¶ 15.

[9] The foregoing schedule anticipates the timely delivery by Defendants of all necessary shareholder records, in a machine readable format, to the Claims Administrator by the date

Event	Time for Compliance
Deadline for publishing Summary Notice	20 days after the Notice Date
Deadline for filing Proofs of Claim	120 days following the Notice Date
Deadline for submission in support of final approval	28 calendar days before the Settlement Fairness Hearing
Deadline for submitting Exclusion Requests or Requests for Written Objections (not required)	21 court days before the Settlement Hearing (90 days after the Notice Date)
Reply/Responses to Any Objections	14 days before the Settlement Fairness Hearing
Settlement Fairness Hearing	Approximately 100 days following entry of the Preliminary Approval Order, or later at the Court's convenience

E. THE REQUESTED ATTORNEYS' FEES AND EXPENSES SHOULD BE PRELIMINARILY APPROVED

For their efforts in creating a common fund for the benefit of the Class, Lead Counsel seeks preliminary approval of its request for an award of less than 6% of the Net Settlement Fund. It has long been recognized that a lawyer who "recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).[10] The Ninth Circuit and this Court have approved the use of the percentage method in common fund cases. *E.g., CLRB Hanson Indus., LLC v. Google,* 05-03649-JW, slip op. (N.D. Cal. Sept. 14, 2009) (awarding 25% of $25 million settlement); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir. 1989); *Six Mexican Workers v. Az. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990); *Torrisi v. Tucson Elec. Power*

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provided in the Preliminary Approval Order. To the extent there are any delays in providing this data to the Claims Administrator, adjustments to the schedule may be necessary.

[10] This rule, known as the common fund doctrine, is firmly rooted in American case law. The purpose of this doctrine is to avoid unjust enrichment so that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*").

Co., 8 F.3d 1370 (9th Cir. 1993).

Here, the requested fee of less than 6% of the Net Settlement Fund, which falls well below the Ninth Circuit's 25% benchmark, is well within the range of reasonableness given (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried; and (5) awards made in similar cases. *See, e.g., Vizcaino*, 290 F.3d at 1048-50; *Immune Response*, 497 F. Supp. 2d at 1175 (recovery of 12% of damages supported a 25% fee award); *OmniVision*, 559 F. Supp. 2d at 1046, (recovery of 9% of damages, three times the usual recovery in securities settlements, supported a 28% fee award) (citing *Heritage Bond*, 2005 WL 1594403, at *11 (median shareholder recovery is in the range of 2-3% of damages, from 2002 through 2007)).

F. REIMBURSEMENT OF EXPENSES SHOULD BE PRELIMINARILY APPROVED

Lead Counsel also requests preliminary approval of reimbursement of approximately $2.6 million of expenses advanced by counsel in prosecuting this action for items such as expert and consultant fees, travel costs, discovery costs, court reporters, legal research, photocopies, postage and filing fees, as well as substantial costs associated with class notice and claims administration. *See Munoz v. UPS Ground Freight, Inc.*, No. 07-00970 MHP, 2009 WL 1626376, at *5 (N.D. Cal. June 9, 2009)(reimbursing routine litigation-related expenses incurred when a review of the proceedings would not reveal any obvious inefficiencies that would require a diminution of the submitted amount); *see also In re Cisco*, 01-20418-JW, slip op. (Dec. 5, 2006) (awarding reimbursement of expenses that amounted to approximately 9% of the total recovery).[11]

Among the largest costs incurred by Lead Counsel were those for Lead Plaintiff's financial and accounting experts whose assistance was essential to the successful prosecution of these actions. In complex litigation such as this, courts do "not doubt the necessity for counsel to

[11] This does not include costs of administration and notice, which Lead Plaintiff is advised will range between $1.6 million and $2.0 million.

retain expert assistance." *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1367 (N.D. Cal. 1996) (recognizing the necessity for counsel to retain securities and financial analysts, forensic accountants, and an investigator to locate and contact potential witnesses); *see also Auto. Prods. PLC v. Tilton Eng'g, Inc.*, 855 F. Supp. 1101, 1107-08 (C.D. Cal. 1994) (finding services of antitrust expert to be necessary to provide jury with a factual basis to ascertain damages). The other categories of expenses for which Lead Counsel seeks reimbursement consist of the type of expenses routinely charged to hourly paying clients – such as travel and court reporter expenses – and therefore are appropriate for reimbursement. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("[Plaintiff] may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client'") (citation omitted); *Media Vision*, 913 F. Supp. at 1366.

V. CONCLUSION

Based upon the foregoing reasons, Lead Plaintiff respectfully requests that the Court (1) preliminarily approve the proposed Class Settlement, Plan of Allocation and request for attorneys' fees and reimbursement of expenses, and (2) enter the Preliminary Approval Order consolidating the Actions, directing that notice be provided to all members of the Class and scheduling a final settlement hearing.

Dated: March 15, 2010

LOWEY DANNENBERG COHEN & HART, P.C.

/S/

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